E. COPY

Office-Supreme Court, U.S.
FILED
APR 4 1961
JAMES R. BROWNING, Clerk

No. 762

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELAND G. CONN AND VICTOR R. CONN, D/B/A CONN INSTRUCTORS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
JEROME S. LEVINSON,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	8

CITATIONS

Cases:

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48	7
United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654	7
United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585	7

588015 61

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 762

ELLARD G. CONN AND VICTOR R. CONN, D/B/A CONN STRUCTORS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion (Slip Op. 1–5) and findings of fact and conclusions of law (Slip Op. 5–29) of the Court of Claims are not yet reported.[1]

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1960. A timely motion to amend and alter the judgment was denied on December 1, 1960. The

[1] Petitioner has not printed the opinion and findings of the Court of Claims. For the Court's convenience, we have filed with the Clerk nine copies of the printed slip opinion, containing also the findings of fact and conclusions of law.

petition for a writ of certiorari was filed on February 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly concluded that two of petitioner's claims were not supported by the evidence.

2. Whether, in the absence of statutory authorization, petitioner was entitled to pre-judgment interest against the United States on its third claim.

STATEMENT

The petitioner partnership brought this action in the Court of Claims to recover sums to which it was allegedly entitled under a contract with the government. The court determined that petitioner was entitled to recovery on one of its claims and entered judgment for petitioner on that claim. The undisputed facts are as follows:

On July 17, 1951, petitioner entered into a contract with the Department of the Navy for the construction of a warehouse at Cherry Point, North Carolina (Slip Op. 5). It developed during the course of the work that the soil conditions at the site were much more stable than had been anticipated (Slip Op. 7). The result was that the piles called for by the contract were substantially shortened but the difficulties of placing them were increased (Slip Op. 8). Further, the amount of excavation and borrow fill was sharply reduced (Slip Op. 7).

In accordance with Article 10 of the contract (Slip Op. 21), adjustments were made in the contract to reflect the changed conditions. First, petitioner was awarded by Change Order J an increase in price of $62,007.44 for performing "all additional work in connection with piling due to changed conditions differing materially from those originally encountered and provided for in the drawings and specifications." (Slip Op. 11). On March 21, 1955, petitioner signed its acceptance of Change Order J although noting that it did not consider the accompanying payment voucher final (Slip Op. 26). Second, because of the reduction in the amount of excavation and borrow-fill, the contract price was reduced by $62,984.16 (Slip Op. 18).

Additionally, and unrelated to the matter of the soil conditions, $17,808.39 was deducted from the price paid petitioner. The basis for this deduction was the elimination from the contract requirements of a provision which the government claimed had required the installation of a five-inch layer of crushed stone, covered by sisal paper, to be placed under the concrete floor of the warehouse (Slip Op. 16).

On July 12, 1956, petitioner instituted an action in the Court of Claims asserting four claims, one of which was later withdrawn. Claim A was for $246,947.26[2] representing additional expenses and overhead incurred by plaintiff as a result of the disruption of its work schedule flowing from the changed piling conditions (Slip Op. 9–10). Claim B was for

[2] This claim was reduced at trial to $197,148 (Slip Op. 10).

$17,808.98, the amount deducted from the contract price because of the purported elimination from the contract of the crushed stone and sisal paper requirement (Slip Op. 7). Claim C was based on the assertion that the measurement of the excavation and borrow fill was not in accord with the terms of the contract and, hence, petitioner had been underpaid $13,931.48 (Slip Op. 19).

On June 8, 1960, the Court of Claims awarded judgment for petitioner on Claim B, without interest. It dismissed Claims A and C as not supported by the evidence (Slip Op. 1–4). The government does not seek review of the court's decision with respect to Claim B.

ARGUMENT

The holding of the Court of Claims that petitioner had not established Claims A and C turns on the particular circumstances of this case and presents no question of general importance. Moreover, that holding, and the court's further conclusion that petitioner was not entitled to interest on Claim B, are clearly correct. Review by this Court is, therefore, not warranted.

1. Petitioner's Claim A was based on the theory that the additional overhead and expenses allegedly incurred by it were attributable to delay occasioned by changed piling conditions. The court below recognized that the pile-driving delays constituted an initial disruption of petitioner's progress (Slip Op. 10). It concluded, however, that, both during a part of the pile driving and after that activity was com-

pleted, there were delays which "were the combined product of [petitioner's] inability to secure materials and [petitioner's] mismanagement." This conclusion rested upon express and detailed findings respecting (1) petitioner's difficulties in procuring reinforcing and structural steel and (2) numerous written complaints sent by the Contracting Officer to petitioner on the matter of its derelictions in the performance of the contract (Slip Op. 10–11).

The court also made reference to the fact that the government's payment to petitioner for "all additional work in connection with piling due to changed conditions differing materially from those originally encountered and provided for in the drawings and specifications" exceeded by $39,744.83 the amount petitioner paid its piling subcontractor (Slip Op. 11). Petitioner was unable to explain what this sum represented and the court took note of the government's claim that it was intended to cover damages attributable to changes in the piling work (Slip Op. 11–12). In this connection, the court found that the damages "even remotely established by [petitioner]" on Claim A fell far short of that figure (Slip Op. 12).

2. As already noted, when work on the contract was initiated, inspection disclosed that the soil was more stable than anticipated. Revised Change Order B therefore provided for the omission of 28,448 cubic yards of excavation and 40,380 cubic yards of borrow fill and, using the increased unit prices of $1.72 and $1.22, respectively, recommended by the Board on Changes, decreased the contract price by $62,984.16

(Slip Op. 18). Petitioner signed its acceptance of Revised Change Order B without apparent protest or reservation (Slip Op. 18). Thereafter, on May 12, 1953, the Contracting Officer advised petitioner that, based upon a compaction factor of 25 percent used in arriving at the original specifications and on earth work yardages computed by petitioner, a total of 96,617 cubic yards of earth had been moved, and unit prices were reduced to $1.65 for excavation and $1.15 for fill (Slip Op. 19).

The court found that, while the record was not clear on the point, petitioner was apparently paid on the basis of Revised Change Order B, rather than the reduced unit prices (Slip Op. 19). In any event, the court noted, petitioner would have received only $130.29 more under the earlier computation than it was entitled to under the Revised Change Order (Slip Op. 19).

Notwithstanding these considerations, petitioner now claims to be entitled to receive $13,931.48 more than the price fixed by Revised Change Order B, because in calculating the quantities the contracting officer did not take into account compaction factors in both cut and fill which the government had purportedly used in estimating the original quantities (Slip Op. 19). But, as the court pointed out, the only person who possessed special knowledge regarding the compaction factor was an employee of petitioner (Slip Op. 19). Although this employee was apparently in Baltimore, and the last session of the trial was held in Washington, he was not called as a

witness by petitioner (Slip Op. 19–20). While one of the partners of petitioner endeavored to testify on the matter, he was found to lack the necessary expertise (Slip Op. 19–20). Additionally, the court found it necessary to exclude certain exhibits offered by petitioner because they were unintelligible in the absence of an explanation by qualified witnesses (Slip Op. 20).

Petitioner does not here challenge either the court's findings respecting its partner's competence to testify or the ruling on the exhibits. Nor has it ever explained the failure of its qualified employee to testify. In these circumstances it is hardly in a position to complain of the ultimate determination of the court on the record before it that petitioner was fully compensated by Revised Change Order B for the excavation and borrow fill work performed under the contract.

3. Petitioner's claim to interest on Claim B is no more substantial (Pet. 5). Congress has not provided for pre-judgment interest on contract claims against the United States. It is beyond dispute that courts have no jurisdiction to award interest on a judgment or claim against the United States unless there is express statutory provision therefor. See *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 661; *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
JEROME I. LEVINSON,
Attorneys.

MARCH 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961